

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF ARGUMENT

Charge against defendant alleging violation of Cal. Penal Code 148(A)(1) is inadmissible since: 1. The information or indictment lacked reasonable or probable cause, and 2. Arrest of defendant on 06242013 was malicious/pretextual and therefore illegal. Therefore, defendant prays the Court to set aside the indictment in the interest of justice.

STATEMENT OF FACTS

During the afternoon of 06242013, defendant rested under the bridge by the Riverwalk. Just prior to dusk, having to urinate, he began to leave toward Old Sacramento to use the restrooms traversing along the lower path which inclines north to converge with the main Riverwalk toward Old Sacramento Park.

Simultaneously, four (apparent) juveniles (later determined to be Tyler Anderson, Deniseia Lacy, Malaysia Allen, and Mary Gibbs) appeared from the bridge area coinciding with his southward travel along the main Riverwalk (above to his left). The three females were being led by a male who was ranting and gesturing loudly and flamboyantly. They began hazing from above shouting ridiculing terms such as “treehugger.” Due to the group’s pace of travel, parties converged at the juncture of the respecting paths. At the convergence, the party continued presenting defendant with targeted banter while cellphone texting with fixed attention on his person. Peacefully, defendant cut across the main Riverwalk path to the trash-can located at the west side of this path with intent (as practical custom) to gather recyclables for income. Without obscenities, he calmly, non-menacingly admonished the party with concise comments concerning their previous conduct toward an elder (as such is according the party with gather recyclables for income. Without obscenities, he calmly, non-menacingly admonished the party with concise comments concerning their previous conduct toward an elder (as such is according to his acculturated values with respect to appropriate free speech within community). Immediately thereafter, the group retaliated with boisterous, nonsensical argumentation. Defendant attempted to ignore them and proceed when Anderson declared, “Okay, let’s go over the bridge,” then began following him retracing their direction. In response, defendant communicated to the effect, “If you are not intending trouble, why are you following me?” Defendant suggested they turn and keep moving.

At Anderson’s behest, the group then turned and traveled north; defendant continued toward his destination. At this juncture, defendant overheard Anderson giving his description over his cell phone indicating a police dispatch call. In order to avoid a possible lingering issue, defendant decided to stay in vicinity to wait and talk with the police. Until the police arrived, he maintained approximately 75 feet distance from the group. While waiting, defendant overheard Anderson making various false accusations and embellished statements while affecting jocular, self-satisfied facial gestures occasionally flashing arrogant smirks at defendant and winking to his friends. By staying in area, they betrayed they were never actually menaced by defendant. At this point, defendant decided to video events for legal purposes. While accessing his cell phone nonthreatingly, Anderson implicatively exclaimed to the dispatcher, “hey... he’s pulling something out of his pocket.” Responsively in defense, defendant began to communicate, and from a distance (requiring higher decibel), to the dispatcher that he was not menacing, attacking the accusers, nor displaying a weapon but only a cell-phone (and for clarification).

Within minutes, two West Sacramento Police squad vehicles speedily arrived, abruptly stopped and shined a blinding spotlight on defendant’s face who was still standing approximately 75 feet distance

from accusers. No violence, criminal activity, nor imminent threat was occurring at the moment. Militantly, officers exited the vehicles. Some immediately commenced taking statements from accusers calmly and respectfully. Another, Officer Wilson advanced toward defendant. After defendant verbally expressed desire to be heard concerning facts of the incident at issue, Wilson tersely commanded him (with inordinate, excessive command presence betraying animos) to sit on a distant bench and wait. Defendant was eagerly expecting rational dialogue concerning the incident (as recently from Ohio) flabbergasted having never been exposed to such extreme systemic behavior before during a “brief investigatory stop” appropriate to such circumstances at the scene. From this point on, all officers (especially one Officer Semeryk) behaved lock-step, knee-jerk, hyper-reactionary, adrenaline rushed and borderline hostile toward the defendant. They immediately and unreasonably escalated to a de facto arrest.

Officer Wilson has averred in his police statement, “Further, HORTON kept reaching for his left pocket while pointing his cell phone at me, as if taking video, with his right hand. I told him no less than two separate times to keep his hands out his pockets.” In response, defendant asserts, subconsciously, he was only preparing to reach for his identification expecting a request for it (as customary) as Wilson approached, he attempted, but was abruptly estopped from, explaining his intention as benign and to cooperate with an ID check respectful to officer’s concerns. Wilson’s paranoid, hypersensitive reactions were unnecessary causation for eliciting nervous, subconscious habits in a tense situation in lieu of Wilson’s extreme, precarious demeanor. After actually complying with an arbitrary order (expressed with excess command presence) to “sit on the bench,” he expressed feeling he was oppressed, stating, “You’re bully me.”

After a moment waiting on the bench, Semeryk approached with Coulter following behind. They expressed desire to perform a frisk search. With intent to cooperate with and facilitate their wish expressed, defendant calmly removed (with a subconscious sense of liberty with respect to movement of his limbs) his backpack which he was wearing. He asserts: “intuitive common sense dictated that removal of this was necessary as less obstructing to a frisk, and necessary for a separate search of it – I resented the thought of disrespected to my dignity if treated incompetent to remove it myself. Although, with just a slight lean forward and slip of my arms, my action was very benign as from a non-deviant/peaceful citizen. The officers militantly shouted ‘... sit down!’ exhibiting a predisposition toward excessive force.”

Shortly thereafter, Semeryk advanced toward defendant, who then began to speak in defense concerning events; he was still currently video recording with his cell phone. As Semeryk came within arms length, with a premeditated quick reflex, he suddenly lunged at defendant’s cell phone. Defendant reflexed by pulling his hand backward ‘to avoid this abrupt, purposed frustration of my filming effort, and to avoid this inappropriate seizure of my property (said cell phone).’ (He asserts, “Firmly, I held conviction that: 1. I had a Constitutional right to record this incident, and 2. Such a seizure, and without respectful communication, was unlawful and corrupt.”) As a result of the force of this lunge with his own arm, defendant states that he felt Semeryk’s own arm scrape against his thumb-nail. Semeryk has averred in his police report, “As he extended his right hand, holding a cell phone, I attempted to apply a department approved control hold, twist lock, to gain Hortpn’s compliance. Horton violently pulled back and I observed him reaching toward the backpack he had just taken off. I pulled Horton away from (sic) the backpack by his right hand and assisted him to the ground into the prone position by guiding his head toward the ground with my right hand.” Selectively, Semeryk omitted from his police report that, at this moment, he attempted a seizure of a defendant’s cell phone without cause. In response, defendant avers:

while compliantly seated on a bench, Semeryk advanced toward him conveying intent to listen to his account of the incident while fixing malicious eye contact. Once in arms length, unprovoked, he violently lunged to grab and seize defendant's cell phone as if by premeditated action. Defendant instantly pulled his hand back sideways and to his right – not toward his backpack positioned to his left.

Immediately thereafter, in an unprovoked fit of rage, Semeryk grabbed defendant and forcefully pulled him off the bench and into the center of the Riverwalk path without mention of placing him under arrest. Semeryk averred in his police report, "I pulled Horton away from the backpack by his right (defendant was holding his cell phone in his right hand) and assisted him to the ground into the prone position by guiding his head toward the ground with my right hand. Officer Coulter immediately assisted in applying a control hold on Horton's left arm." Implying resistance, he continued, "Horton resisted with great physical exertion while trying to free his right hand from my grip and bring it toward his waist area..." In response defendant avers: "Immediately upon being grabbed and dragged inexplicably, I instantly focused attention on stopping and saving cell phone video in progress to ensure its keeping. I was holding my hand high and to my right fixing attention on it while otherwise enduring what I rationally believed to be police brutality – not an arrest, since no mention of arrest was made. I was zealous to frustrate Semeryk's attempted obstruction of my video effort; however, otherwise, I was entirely compliant. The task of saving the video last only a few seconds. All the while, I was being dragged and pushed by Officer Semeryk without knowing why, but I did not resist nor respond with physical retaliation. Officer Coulter, meanwhile, was observing from approximately fifteen feet to the north. At the exact moment I accomplished saving data... Coulter announced, 'You're under arrest... stop resisting.' Immediately, I became compliant with all requests." Officer Semeryk ordered me to the ground and preformed a forceful frisk while communicating a litany of taunts and insults.

Semeryk has averred in his police report: "Horton kept saying that he was doing nothing wrong and made incoherent statements about the government setting him up to be taken to jail. He accused the reporting party to be a government agent who worked for the police. Horton was saying he was the actual victim and was attacked by the reporting party and his friends." In response, defendant asserts, firstly, he never verbalized that "he was 'attacked' by the reporting party..." but that he was harassed then falsely accused by the reporting party and therefore was "the actual victim." Secondly, as to implications about "incoherent statements," he states: "Actually, I verbally alluded with concise statements to my rational belief that the arrest was false and pretextual involving civil rights violations as a First amendment right. I was in fact cogent in context questioning and correcting their misconduct as a civic duty. My statements were few, brief – not belligerent, yet firm and adamant. Semeryk has defensively misrepresented my statements by vaguely referring to them as 'incoherent statements about the government setting him up...' I resent the implication.

Defendant was never Mirandized the entire night before imprisonment." At the Yolo County sheriff Department, officers charged defendant with violation of Cal. Penal Code §§ 415 per the citizen's arrest which officers had influenced Anderson to make during questioning.

ARGUMENT

INFORMATION OR INDICTMENT LACKED REASONABLE OR PROBABLE CAUSE

Initial "detention tantamount to arrest," as well as the subsequent excessive force carried out by Semeryk were without reasonable cause since defendant "posed no threat to the safety of the officers" nor did he "attempt to flee or resist arrest." In support, the court held *Solomon v. Auburn Hills Police Department*

that “force was excessive because suspect was arrested on a minor charge, did not pose a threat to the safety of officers or others and did not attempt to flee or resist arrest” (*Solomon v. Auburn Hills Police Department* (2004) 389 F.3d 167). Also, it held that “In assessing reasonableness, it is necessary to take into account the “totality of circumstances that bear on the use of force.” The circumstances are as follows:

- Youthful informants reported a very minor offense,
- Defendant was carrying no open (or other actual) weapon,
- There was no crime nor violent activity in progress (not before for that matter) at the scene,
- Defendant’s demeanor was non-violent and relatively calm – he was only zealously interested in equal protection to be heard about begin falsely accused,
- Defendant was wearing a backpack; however, a clothing item worn on the back precludes expeditious access to its contents, hence his front posed no threat.
- Semeryk’s only assertion relevant to ‘safety of a police officer’ referenced his “appearance of a transient/homeless person” – a discriminatory profile (from which he derived unreasonable assumptions). *Terry v. Ohio* has held, “Intrusions upon constitutionally guaranteed rights must be based on more than inarticulate hunches, and simple good faith on part of officer is not enough” (*Terry v. Ohio* (1968) 392 U.S.1). Furthermore, “In justifying particular intrusion, police officer must be able to point to specific and articulable facts which, taken together with rational inferences from these acts reasonably warrant that intrusion; facts must be judged against objective standard of whether facts available to officer at moment of seizure or search warrant man of reasonable caution in belief that action taken was appropriate” (*Terry*). Likewise, in *Dunaway v. New York*, the court held, “Hostility based on mere suspicion was a prime motivation for the adoption of the Fourth amendment.”

Police claims concerning defiant behavior are prejudicial based on misperception and conflict-of-interest. Defendant reasonably expected to endure an investigatory stop. Reasonably, he initiated attempts to communicate asserting his equal protection rights to be heard concerning facts. Officers immediately denied them by immediate and unreasonable escalation to de facto arrest when Cal. Penal Code §§ 837 precludes arrest of suspect for a misdemeanor not committed in the presence of officers. By exhibiting excess command presence, they betrayed hyper-vigilant intent to maliciously prosecute behaving prejudicial toward client.

Although *Terry* court held, “Police may in appropriate circumstances appropriate manner approach person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest,” officers’ initial manner of approach was unreasonable and inappropriate given the totality of circumstances. “Courts have responsibility to guard against police conduct which is overbearing or harassing or which trenches upon personal security without objective evidentiary justification which Constitution requires...” (*Terry*).

In consideration of the above, the officers’ high alert status was extremely paranoid and extreme. In context, defendant did not resist arrest, but was only protecting evidence while victimized by police misconduct. Using his right hand to save data on his cell phone before an arrest was announced could hardly be considered resisting an arrest. Ultimately, defendant actually did comply with all reasonable requests and orders considering totality of the circumstances.

ARREST WAS PRETEXTUAL AND THEREFORE ILLEGAL]

On or around 05/04/2013, defendant visited McDonald's located at 2729 West Capitol Avenue, West Sacramento. After his meal, he utilized restroom facilities at this place of public accommodation. While he was in the restroom; Officer Kirkland entered and pointed a projectile weapon over the door of the stall he occupied while simultaneously exclaiming, "Hey... get out of there or I'll shoot this thing at you!" (Defendant is not positive whether the aimed weapon was a "stun gun" or a "ballistics weapon." He described the object he observed over the stall door as a "hard plastic pistol nozzle.") Defendant stated he would comply once completely fastening his belt (which he was in the process of doing) and engaged his cell phone camera to video the incident. While videoing, defendant discoursed with Kirkland about the propriety of Kirkland's action. During the discussion, Kirkland stated he responded to a dispatch call claiming that defendant was trespassing. Defendant was not aware of any immediately explicable or reasonable cause for such claim and asserts it was extremely discriminatory.

During filmed discourse with Kirkland, defendant alluded to a longstanding conflict-of-interest with McDonald's Corporation (and other entities) involving discrimination and harassment at places of public accommodation for which he is actively pursuing redress (as an explanation for extreme actions toward himself at such locations). In reference, defendant exclaimed, "It's bullcrap." Kirkland responded, "If it's bullcrap... I'm going to get to the bottom of it," then interrogated requesting personal information with a notepad and pen. Since this incident, defendant has initiated multiple internal affairs complaints at both the West Sacramento Police Department and City Hall.

During the incident at issue, Semeryk exhibited excessive interest in defendant's cell phone which the police department would be aware) contained video taken of discourse with Kirkland aforementioned. During arrest, after specifically seizing this item, Semeryk kept it on his person (separate from all other items gathered for storage) and operated it in the squad vehicle enroute to Yolo County Sheriff's Department. West Sacramento Police Department's Case "Report, in the itemization of property stored, listed the LG cell phone as individually submitted in to "Locker D" and is collection purposes as "Evidence." All other property is listed as or "safe keeping" with the exception of one item as "other." During booking, Semeryk vocalized that he wanted to initiate an investigation to discover "everything about this guy."

After release from Yolo County jail, on 06/26/2013, defendant did not receive all property gathered and stored from property release at West Sacramento Police Department. One item conspicuously missing was his LG cellphone. Defendant filed a complaint requesting reimbursement for lost or stolen items including also: 1. A tent, and 2. A book entitled Regulatory Politics in Transition which defendant has on his person as relevant to his longstanding practice of socio/politico/religious activism. He rationally suspects these items were kept and/or held for forensic profiling efforts and other political reasons in lieu of experience with plethora of such uncanny actions toward himself since engaging in these activities during the post 9/11 environment. Kindly, City Hall has reimbursed him for loss of these items; however, during the process, defendant was dropped. In consideration of this train of events, defendant has rational reason to induce that his arrest was malicious and pretextual to acquire his phone discovery concerning a surrounding situational context. According to U.S. v. Mota, "Arrest is mere pretext for search if motivation or primary purpose of arresting officers is to arrest defendant for minor offense so as to allow police to search for evidence of unrelated

offense for which police lack probable cause to arrest or search” (U.S. v. Mota (1993) 9982 F.2d).

CONCLUSION

Charge is minor based on minimal evidentiary facts. As a matter, the first charge stemming from Anderson’s citizen’s arrest was dropped before arraignment. Moreover, weight of evidence supports assertion that defendant has been targeted for harassment and malicious, pretextual arrest. Defendant is not even resident of area but has been traveling; he desires to move on; is being administratively harassed by being restrained to an area unreasonably against his will. He has no outstanding warrants and a very minimal criminal record. Zealous prosecution would only reinforce defendant’s belief that exploitation of such a minor offense is pretextual for a malicious ulterior motive and would belabor the Court with unnecessary expense. Therefore, it would be in the interest of justice for the Court to dismiss charge.

For the reasons stated above, the defendant respectfully requests that this Penal code section 995 motion be granted and his motion dismiss